SELVAM HOLDINGS (MALAYSIA) SDN. BHD.

v.

TOBY LAM AS THE RECEIVER AND MANAGER AND LIQUIDATOR OF SELVAM HOLDINGS (M) SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' ABDUL AZIZ BIN MOHAMAD J.
[ORIGINATING MOTION NO.D6-25-42-1992]
24 OCTOBER 1994

COMPANY LAW: Winding-up - Company known as Selvam Holdings (M) Sdn. Bhd. wound-up - No company registered by such name - Liquidators proceeding with winding-up against the applicant company - Allegation that Selvam Holdings (M) Sdn. Bhd. was not the applicant company - Whether the order to wind-up the applicant was null and void - Preliminary objection on locus standi of Counsel for 1st respondent to represent him - Contention that 1st respondent, as liquidator had appointed Counsel without authority of the Court or the committee of inspection contrary to s. 236(1) (e) of the Companies Act 1965 - Whether any merit to objection - Whether a liquidator's power to appoint Counsel to defend him falls under s. 236(2) (a) or (i) of the Companies Act 1965.

On 19 November 1979, a company known as Selvam Holdings (M) Sdn. Bhd. (Selvam (M)) was ordered to be wound up and the 1st respondent and another were appointed liquidators of the company. There was in fact no company registered in that name but the respondents considered the company ordered to be wound up was Selvam Holdings (Malaysia) Sdn. Bhd. (Selvam (Malaysia)), the applicant, and steps were taken to wind up the property of the applicant. On 26 August 1992, the applicant filed the present application for *inter alia* an order that the winding-up order was neither binding nor effective upon the applicant which was supported by the affidavit of one of the directors/shareholders. According to the affidavit, the applicant was incorporated as Selvam (Sdn.) Bhd. but changed its name to Selvam Holdings (Malaysia) Sdn. Bhd. In 1977 the applicant obtained a loan from Arab-Malaysia Development Bank Berhad (AMDB) which was guaranteed by Bank Buruh Malaysia Berhad (BBM) on the security of a debenture executed by Selvam (M) in favour of BBM on the applicant's land, Lot 445. The debenture contained several terms which identified Selvam (Malaysia) as being the same as Selvam (M) and a copy of the certificate of title to Lot 445 showed that the charge was registered with the chargor named as Selvam (M). It was alleged that Selvam (M) was an existing company which was not the applicant and which had unlawfully charged the applicant's land.

The applicant changed solicitors twice. When the case came up for hearing on 8 December 1993, the new Counsel for the applicant raised a preliminary objection as to the *locus standi* of learned Counsel for the 1st respondent to represent him on the basis that the 1st respondent as a liquidator had appointed his Counsel without the authority of the Court or the committee of inspection contrary to s. 236(1) (e) of the Companies Act 1965 (CA 1965).

Held:

[1] Based on the facts disclosed, the only conclusion was that Selvam Holdings (M) referred to the applicant. There were no two companies. There was only the applicant which had sometimes been referred to as Selvam Holdings (M). What the applicant's director was attempting to do in his affidavit was take advantage of a technical defect, that is the imprecision in the naming of the company to project the illusion of a factual existence of two companies. The fact that there was no company registered as Selvam (Malaysia) was established by a letter exhibited from the Registrar of Companies to that effect and another letter from the Official Assignee certifying that no winding-up order had been made in respect of Selvam (Malaysia). Those letters however, merely stated the true position by strict reference to the given company name. They did not mean that Selvam (Malaysia) was not the company registered as Selvam (M) or that that company had not, as Selvam (M) been ordered to be wound up.

[2] The company ordered to be wound up was the applicant and the winding-up order was not rendered null and void and ineffective by reason that it referred to the applicant as Selvam Holdings (M) Sdn. Bhd.

[3] With reference to the applicant's preliminary objection, the 1st respondent was also sued in his capacity as receiver and manager of the applicant which was not governed by s. 236(1) (e) CA 1965. Furthermore, s. 236(1) (e) did not apply to the appointment of an advocate and solicitor to defend a liquidator against a suit arising out of the performance of his duties as liquidator. Paragraph (e) of s. 236(1) speaks of the appointment of an advocate by a liquidator "to assist him in his duties". The duties envisaged are the ordinary administrative and management duties of a liquidator such as those within his ordinary professional competence. It is only that kind of duty that the words "to assist" can comfortably go along with. Even were the first respondent to be treated as not having the *locus standi* to defend this application the Court would still not allow it because the affidavit in support of this application itself showed that the application had no merit. The objection would be dismissed for that reason and additionally on the contest of the 2nd respondent which would still remain.

[4] Paragraph (i) of s. 236(2) which gives power to "appoint an agent to do any business which the liquidator is unable to do himself" appears to be wide enough to enable a liquidator to appoint an advocate and solicitor to defend him. If in defending this application the 1st respondent can be said to be doing so "in the name and on behalf" of the applicant, he had the power under paragraph (a) of s. 236(2) to appoint an advocate and solicitor because to defend any action he must necessarily engage an advocate and solicitor. Whatever the position may be under s. 236(2), as long as the 1st respondent was not caught by paragraph (e) of s. 236(1), he did not need to get the authority either of the Court or of the committee of inspection to appoint an advocate and solicitor.

[Application dismissed with costs].

Cases referred to:

Durham Fancy Goods Ltd. v. Michael Jackson (Fancy Goods) Ltd. [1968] 2 QB 839. ***(cit)***

Banque de 1'Indochine v. Euroseas Finance [1981] 3 All ER 198. ***(cit)***

Legislation referred to:
Companies Act 1965, ss. 236 (1) (e) & 236 (2) (a).
Companies Act 1948, s. 108(UK)

For applicant: S. Selvarajah (J. Fernandez with him); M/s. Fernandez & Co.
For the 1st respondent - P.S. Gill; M/s. Gill & Tang.
For the 2nd respondent - Azhar Mohamed , Senior Federal Counsel.

JUDGMENT

Abdul Aziz bin Mohamad J:
On 19 November 1979, on the petition of Grant, Kenyon & Eckhardt Sdn. Bhd. in Companies Winding-up No. 34/1979, a company cited as Selvam Holdings (M) Sdn. Bhd. was ordered to be wound up. On 25 August 1981, the first respondent and another were appointed liquidators of the company to succeed the Official Receiver, who had been appointed provisional liquidator on 19 November 1979. There was no company registered as Selvam Holdings (M) Sdn. Bhd., but to the first and second respondents the company that was ordered to be wound up was Selvam Holdings (Malaysia) Sdn. Bhd., and steps in the winding-up were accordingly taken on that basis, with the result that the property of Selvam Holdings (Malaysia) Sdn. Bhd. and the interests of its directors and shareholders were affected.

With the exception of the fact that there was no company registered as Selvam Holdings (M) Sdn. Bhd., all those facts are disclosed by the second part, comprising paragraphs 14 to 22, of the affidavit in support of this application, which is represented to be the application of Selvam Holdings (Malaysia) Sdn. Bhd., and which was filed on 26 August 1992, thirteen years after the winding-up order. This application seeks an order that that winding-up order "is neither binding nor effective upon the applicant" and several consequential orders for undoing the effects of the winding-up. That affidavit is by one Balasingam a/l Sarvanamuthu, who claims to be a director and shareholder of the applicant. From paragraph 21 of that affidavit I am inclined to believe that this application was initiated by Balasingam after he, as he claims, became a director and shareholder of the applicant. From his subsequent affidavit affirmed on 18 September 1992 it is clear that he considers himself to have been appointed director on 3 August 1992, about three weeks before this application was filed. It is that affidavit that establishes that there was no company registered as Selvam Holdings (M) Sdn. Bhd.

The first half of Balasingam's affidavit in support of this application, comprising paragraphs 1 to 13, deals with matters that occurred before the said winding-up order. Those paragraphs and the related exhibits disclose the following facts.

The applicant was incorporated on 17 December 1971 as Selvam (Sdn.) Bhd. On 27 March 1975 it changed its name to Selvam Holdings (Malaysia) Sdn. Bhd.

In 1977 the applicant applied for a loan of RM1,700,000 from the Arab-Malaysia Development Bank Berhad ("AMDB") to be guaranteed by the Bank Buruh (M) Berhad ("BBM") on the security, *inter alia*, of a debenture executed by the applicant in favour of BBM on the applicant's Semenyih land, which I shall designate briefly as Lot 445.

On 13 June 1977 BBM and AMDB executed the guarantee agreement. It says that at BBM's request AMDB agreed to lend RM1,700,000 to the applicant whose address is given as No. 140, 1st Floor, Jalan Tuanku Abdul Rahman, Kuala Lumpur. For the terms of loan, the agreement refers to AMDB's loan memorandum dated 18 May 1977 to the applicant. It provides, *inter alia*, that BBM shall, on AMDB's demand, repay AMDB the loan.

On 12 September 1977 a deed of debenture was executed by BBM and a company cited as Selvam Holdings (M) Sdn. Bhd. The address of this company is given as a certain number, 1st Floor, Jalan Tuanku Abdul Rahman, Kuala Lumpur, the number being, in the preamble, 40, in s. 2.01(b), 140, and in s. 9.01(a), 40. I note that while the guarantee agreement gives No. 140 as the applicant's address, the notice, in Form 44, of change of address of the registered office of the applicant with effect from 3 August 1992, exhibited to Balasingam's affidavit affirmed on 18 September 1992, gives the previous address of the applicant as No. 40.

I believe the former address of the applicant was No. 40 and not, as in the guarantee agreement, No. 140, which must be a mistake, just as No. 140 in s. 2.01(b) of the deed of debenture must also be a mistake. The correct address relating to Selvam Holdings (M) Sdn. Bhd. in the deed of debenture must also be No. 40.

The deed of debenture contains several terms which are relevant to the identity of Selvam Holdings (M) Sdn. Bhd. Section 1.0 says that that company owns Lot 445. It has been seen that the applicant owned Lot 445. Section 1.03 says that at BBM's request and by the loan memorandum dated 18 May 1977, AMDB granted a loan of RM1,700,000 to Selvam Holdings (M) Sdn. Bhd. It is to be noted that it is the same loan that was agreed to be given to the applicant. Section 1.04 says that BBM has executed a guarantee agreement dated 13 June 1977 in favour of AMDB. It is to be noted that it is the same guarantee agreement mentioned earlier that cites the applicant as the borrower. Clause 1.05 says that, in consideration of BBM's guarantee, Selvam Holdings (M) Sdn. Bhd. is now executing the debenture in favour of BBM. Section 3.02(a) says that Selvam Holdings (M) Sdn. Bhd. has executed a charge on Lot 445 to BBM. It is the same land that, as I have already said, Balasingam's affidavit discloses that the applicant was to execute a debenture on in favour of BBM.

The copy of the certificate of title to Lot 445 exhibited to Balasingam's affidavit shows that the charge was registered on 21 September 1977, with the chargor named as "Selvam Holdings (M) Berhad".

I was amused to note from the copy of the certificate of title that while the endorsement of charge dated 21 September 1977 named the chargee as Bank Buruh (M) Berhad, the endorsement of release of charge dated 25 November 1986 named the party releasing the charge as Bank Buruh (Malaysia) Berhad. With the applicant's contention in this case in mind, I wondered if it would ever be suggested that the charge was released by a different bank than the chargee bank.

On 23 March 1977, continues Balasingam's affidavit, BBM appointed Francis Chong and Ahmad Kamal to be receivers and managers of Selvam Holdings (M) Sdn. Bhd. under the debenture of 12 September 1977, and on 16 September 1980 the first respondent replaced Ahmad Kamal.

Those are the facts revealed by the first half of Balasingam's affidavit in support. While Balasingam, from the way paragraphs 8 and 9 of that affidavit is drafted, seems to be alleging that Selvam Holdings (M) Sdn. Bhd. is an actually existing company which is not the applicant - a company that has unlawfully charged the applicant's Semenyih land - Balasingam has not attempted to explain how such confusion could have come about.

Looking only at the facts disclosed by and through the first part of Balasingam's affidavit in support of this application and his affidavit of 18 September 1992, the only conclusion I can possibly come to is that Selvam Holdings (M) Sdn. Bhd. refers to the applicant. There are no two companies. There is only the applicant, which has sometimes been referred to as Selvam Holdings (M) Sdn. Bhd. What Balasingam is attempting to do in his affidavit is to take advantage of a technical defect, that is the imprecision in the naming of the company, to project the illusion of a factual existence of two companies.

The fact that there was no company registered as Selvam Holdings (M) Sdn. Bhd. is, as I said, established in Balasingam's affidavit of 18 September 1992, which exhibits a letter from the Registrar of Companies to that effect. Balasingam's affidavit in support also exhibits a letter from the Official Assignee which certified that no winding-up order had been made in respect of Selvam Holdings (Malaysia) Sdn. Bhd. Those letters, however, merely stated the true position by strict reference to the given company name. They did not mean to say that Selvam Holdings (M) Sdn. Bhd. was not the company registered as Selvam Holdings (Malaysia) Sdn. Bhd. or that that company had not, as Selvam Holdings (M) Sdn. Bhd., been ordered to be wound up.

Recognition of the fact that there was only one company and the name Selvam Holdings (M) Sdn. Bhd. referred to that company, which is the applicant, was unwittingly betrayed by learned Counsel for the applicant at that time at the very outset of his oral submission when he stated the question in this application as being - according to my notes - "Whether a company can be wound up in its wrong name". The question being put thus, it carried the admission that the issue was one of improper naming and not one of confusion of identity between two companies.

I need not set out the contents of the affidavits of the respondents. I need only say that they furnish ample proof that Selvam Holdings (M) Sdn. Bhd. refers to the applicant and that the applicant itself, through its servants and agents, has been in the habit of referring to itself in its dealings by the shortened name of Selvam Holdings (M) Sdn. Bhd. Those are facts that I would find it impossible that Balasingam and the past and present legal advisers and agents of Balasingam or the applicant were not aware of.

The fact that there has been only one company having been established, the question in this application remains one only of law, and that is whether the order to wind up the applicant is null and void and ineffective by reason that it refers to the applicant as Selvam Holdings (M) Sdn. Bhd. instead of by its registered name of Selvam Holdings (Malaysia) Sdn. Bhd. Were I not to be restrained by some clear and binding authority, I should think I would be contributing to making an ass indeed of the law if I were to answer the question in the affirmative. The applicant has not come up with such authority.

One case cited for the applicant was *Durham Fancy Goods Ltd. v. Michael Jackson (Fancy Goods) Ltd.* [1968] 2 QB 839. However, the question that was decided in that case was a different question than what I posed just now. It concerned s. 108 of the English Companies Act 1948 which required that "Every company ... shall have its name mentioned in legible characters ... in all bills of exchange ... signed by or on behalf of the company ... " and provided the consequences of not complying. A director and secretary of a company called *Michael Jackson (Fancy Goods) Ltd.* signed on its behalf a bill of exchange in which the name mentioned was "M. Jackson (Fancy Goods) Ltd., Manchester". There was no question but that the name referred to Michael Jackson (Fancy Goods) Ltd., but it was held that the name was not the proper name of the company, as "M" was not an acceptable abbreviation of "Michael", and therefore s. 108 had been contravened. It would not follow from that interpretation of s. 108 that if the company were to be ordered to be wound up and the order were to use the abbreviated name the winding-up order would be null and void even if there was no doubt at all that the order referred to the company. The other case cited for the applicant, *Banque de l'Indochine v. Euroseas Finance* [1981] 3 All ER 198, was also a case on s. 108. In any case I accept the testimony of the Registrar of Companies in his affidavit that there has been a long-standing practice in this country to accept the letter "M" as an abbreviation for "Malaysia".

I find as a fact that the company that was ordered to be wound up on 19 November 1979 in Companies Winding-up No. 34/1979 was the applicant and I rule that the winding-up order was not rendered null and void and ineffective by reason that it referred to the applicant as Selvam Holdings (M) Sdn. Bhd.

For the purposes of this application, the applicant changed solicitors twice. On 19 October 1993 Tetuan Nashir Johal & Co. gave notice of change of solicitors from the solicitors who had been acting for the applicant from the beginning, Tetuan Narayanan Mohanadas & Associates. On 19 May 1994 Tetuan Fernandez & Co. gave notice of change of solicitors from Tetuan Nashir Johal & Co.

Written submissions had been put in before 8 September 1993 by all parties. When this case came up on that date, it was adjourned to 8 December 1993 to enable learned Counsel for the defendants to reply to an affidavit of the applicant which had been recently put in.

By 19 October 1993 the first change of solicitors for the applicant had taken place. When the case came up on 8 December 1993, the new Counsel for the applicant raised a preliminary objection as to the *locus standi* of learned Counsel for the first respondent to represent him. I adjourned the hearing until 1 March 1994 for further submissions on the preliminary objection, and on that date I reserved my decision on this application and on the preliminary objection to be delivered together.

The present solicitors, who were appointed after that adjournment, appear to have been appointed - at least as far as can be seen from the file of this application - to apply for leave to discontinue this action, which was applied for on 30 May 1994 and which I have already refused.

The point of the preliminary objection raised by the then Counsel for the applicant on 8 December 1993 was that the first respondent, as liquidator, had appointed Counsel to represent him in this application without the authority of the Court or of the committee of inspection, contrary to s. 236(1)(e) of the

Companies Act 1965. The applicant's Counsel therefore requested the Court to strike out the first respondent's appearance so that, as a result, he had never appeared and all acts done by him to resist this application would be null and void and this application would succeed by default.

Even were the first respondent to be treated as not having the *locus standi* to defend this application, I would still not allow it, because, as I have already said, the affidavit in support of this application itself shows that the application has no merit. I would still dismiss it for that reason and, additionally, on the contest of the second respondent, which would still remain.

At all events, I do not think there is merit in the objection. I more or less agree with learned Counsel for the first respondent on two points.

The first point is that the first respondent is also sued in his capacity of receiver and manager of the applicant. In that capacity he is not governed by s. 236(1) (e).

The second point is that s. 236(1) (e) does not apply to the appointment of an advocate and solicitor to defend a liquidator against a suit arising out of the performance of his duties as liquidator. Paragraph (e) of s. 236(1) speaks of the appointment of an advocate by a liquidator "to assist him in his duties". In my opinion the duties envisaged are the ordinary administrative and management duties of a liquidator such as those that are within his ordinary professional competence. It is only that kind of duties that the words "to assist" can comfortably go along with.

When a liquidator is sued, as in this case, the liquidator has a problem which falls outside his professional competence as liquidator and for which he must engage an advocate and solicitor to represent him to resist the suit. The first respondent's duty to resist this application is not, in my opinion, one of a kind intended by the word "duties" in paragraph (e), and Counsel acting for him in this case cannot be said to have been appointed by him "to assist him in his duties".

As to whether a liquidator's power to appoint an advocate to defend him in an action brought against him falls under s. 236(2) (a) or (i) is a secondary question. Paragraph (i) of s. 236(2) - which gives power to "appoint an agent to do any business which the liquidator is unable to do himself" - appears to be wide enough to enable a liquidator to appoint an advocate and solicitor to defend him. If in defending this application the first respondent can be said to be doing so "in the name and on behalf" of the applicant, I would decidedly say he had power, under paragraph (a) of s. 236(2), to appoint an advocate and solicitor because to defend any action he must necessarily engage an advocate and solicitor. Whatever the position may be under s. 236(2), as long as the first respondent is not caught by paragraph (e) of s. 236(1) - and I do not think he is - he does not need to get the authority either of the Court or of the committee of inspection to appoint an advocate and solicitor.

For the reasons given earlier on, I dismiss this application.

The respondents must be paid their costs, but before deciding who should be liable for their costs, I should like to hear some submission on the question, as learned Counsel for the first respondent has urged that it should be Balasingam or his solicitors.